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No. 430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BASWELL FARMS AND HATCHERY, INC., a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners,

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,
ST. LOUIS SAN FRANCISCO RAILWAY COMPANY, a corporation,
SEABOARD AIR LINE RAILROAD COMPANY, a corporation,
Respondents.

BRIEF FOR RESPONDENT SOUTHERN RAILWAY COMPANY

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December 28, 1962

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BRIEF FOR RESPONDENT SOUTHERN RAILWAY COMPANY

STATUTES INVOLVED

Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), provides:

> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual

or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision

shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Section 8 of the same Act, 49 U.S.C. § 8, reads:

"That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

QUESTION PRESENTED

Whether the Interstate Commerce Act means what it says in providing that a rate filed by a carrier and thereafter suspended by the Commission "shall go into effect" at the end of the statutory suspension period, even if the Commission has not concluded its hearings; or whether, on the other hand, a United States district judge has jurisdiction and authority to do what the Commission is not permitted to do, namely, restrain the carrier from putting the rate into effect

after the end of the statutory suspension even though, if the rate goes into effect and is subsequently held illegal, persons injured thereby have a statutory remedy for damages, whereas if the rate is not permitted to go into effect and is subsequently found legal, shippers and consumers as well as the carrier, who would have benefited from the rate, have no remedy whatsoever for injuries suffered by reason of the suspension.

STATEMENT

Petitioners are a barge line (Arrow), a municipality served thereby (Guntersville), a grain merchant located in that municipality (Walls) and a user of grain shipped from that municipality by truck (Bagwell). (R. 6) Neither Guntersville nor Bagwell is located on the system of respondent Southern, and neither Walls nor Bagwell is a shipper on that system. (R. 17, 38, 45-46) Bagwell is not located on any railroad. (R. 38)

In this case petitioners seek reversal of a decision of the Court of Appeals for the Fifth Circuit. (R. 116-125) That court on September 7, 1962, unanimously affirmed a District Court judgment denying petitioners' application for an injunction. (R. 52-58) The injunction sought was one to prevent respondent from putting into effect certain reduced rates for the transportation of grain, which rates respondent had duly filed with the Interstate Commerce Commission and were, in accordance with the terms of the Interstate Commerce Act, about to become effective.[1] (R. 8)

[1] Petitioner named four railroad defendants in its complaint in the District Court. (R. 4-5) The defendants other than respondent Southern entered appearances but filed no responsive pleadings and have taken no active part in the ensuing litigation. Respondent here appears, of course, only in its own behalf.

There is only one issue in this case, and that issue is, as petitioners themselves perforce recognize, a narrow one. (Pet. Br. p. 10) It is whether the courts below were correct in holding that under the scheme of the Interstate Commerce Act an injunction could not properly issue to prevent respondent's rates from becoming effective while those rates were under investigation by the Interstate Commerce Commission, and after the seven-month suspension period specified in the statute had expired. No question is before this Court as to whether the rates petitioners seek to enjoin comply with the standards of the Interstate Commerce Act or whether respondent's motives in publishing them were beneficent or malevolent. Those are concededly matters to be determined by the Interstate Commerce Commission alone, after full hearing.

Petitioners have, nevertheless, indulged in extravagant assertions that this case involves "the latest episode in the war of extermination being waged by the Southern Railway against barge transportation on the Tennessee River" and have characterized respondent's motives as "nothing less than the destruction of the Tennessee River as an artery of commerce . . . ." (Pet. Br. p. 9) For this reason we think it appropriate to put before this Court a summary statement of the history and structure of the rates that petitioners seek to enjoin, as disclosed by evidence adduced in the investigatory proceeding before the Interstate Commerce Commission and by affidavits filed in the District Court.

The rates referred to are the result of an effort by respondent that, with the enthusiastic support of both public and private interests in the Southeast, brought together experts and ideas from many sources to con-

tribute a series of radical transportation innovations. The Southeast is a rapidly developing area with an increasing diversity of economic activity. It consumes a great deal of grain, much of which is imported from elsewhere in the country. (R. 18) Studies undertaken by respondent indicate that the vast quantities of grain being moved into the Southeast from other parts of the country are at the present time carried largely by back-haul "gypsy" truckers and merchant truckers whose rates are exempt from regulation by the Interstate Commerce Commission, with barge lines, also free for the most part from rate regulation, and railroads sharing the remainder of the traffic. (R. 18-19) The high existing rates on that portion of the grain moved by the railroads has in the past tended to provide an "umbrella" over the charges upon the balance of the grain movement.

Respondent decided to attack this problem at its source, by finding methods of cutting rail transportation costs in order to make possible substantially reduced rail rates. Seeking to develop special freight cars with the highest possible ratio of cargo capacity to empty weight, and so designed as to minimize loading and unloading costs, it went outside the railroad equipment industry to Lockheed Aircraft Corporation. (R. 17-18) Here, by application of advanced light metals construction techniques, there were produced so-called "Big John" freight cars with aluminum bodies, especially designed and built for grain movement and with a cargo capacity approximately twice that of conventional box cars used for carrying grain but an empty weight only slightly greater. (R. 19) In order to secure the development and manufacture of these cars on an economically feasible basis

it was necessary to acquire them in substantial numbers. Accordingly, respondent purchased a total of 575 of the cars, all of which have been delivered. (R. 137)

To accomplish further economies in operating costs respondent concluded in the first instance to make the rates applicable only to movements in five, ten and twenty car lots, which permit substantial savings in switching service at plants and in classification and transfer, and to provide under them only bare transportation with no costly in-transit privileges and with strict demurrage rules and demurrage charges higher than those ordinarily imposed, all designed to keep to an absolute minimum the time these expensive cars are out of transportation service. (R. 19) Cost studies made by respondent have indicated that under all these circumstances the rates will yield more than 140 per cent of costs. (R. 22)

At the outset, the rates were made applicable to grain movements from the river crossings on respondent's system at Cincinnati, Louisville, Evansville, St. Louis and Memphis to points on its system in the Southeast. When it became apparent, during the course of the Commission investigatory proceeding, that a demand might exist for these rates to and from other points, respondent offered on the record to extend them to and from any point on its system where they are desired, whether such point is on a river or inland. (R. 17) In response to the suggestion that the rates might be unfair to the small shipper because they applied only to multiple-car lots, respondent also offered on the record to publish, at the time the multiple-car rates go into effect, comparable single-car rates higher only

in the amount necessary to cover the increased costs of handling such shipments.[2] (*Ibid.*)

The applicability of the rates in no way depends upon whether the grain involved is grown at the point of origin or whether any previous shipment has been by rail, barge or other mode of transportation. The rates are based on a mileage scale and in every instance are directly related to the short-line railroad mileage from origin to destination. (*Ibid.*)

Respondent filed its new schedules in July 1961. (R. 16) On August 7, 1961, the Commission's Board of Suspension suspended their effectiveness for the seven-month period authorized by Section 15(7) of the Interstate Commerce Act, and an investigatory proceeding was instituted as required by the statute. During the course of the hearing respondent agreed to extensions of the suspension period for five additional months to compensate for various delays. As so extended the suspension period expired on August 7, 1962.[3] (R. 16-17)

The evidentiary hearing before an examiner began on January 8, 1962. (R. 23) Early in the course of that hearing it became apparent that respondent's be-

[2] These developments, which occurred well after the rates were suspended by the Interstate Commerce Commission (see *infra*), at the very least throw serious doubt on petitioners' contention that the rates are "grossly discriminatory" as to single-car shippers and as among localities.

[3] Respondent declined to make any further voluntary suspension of the rates because it was unwilling to disrupt business transactions planned by shippers in anticipation of their going into effect, and because it and the people of the South had already been deprived, without possibility of redress, of the benefits of the rates for an extended period. (R. 16-17)

lief that the proposed rates would serve an important public need in the Southeast was widely shared not only by shippers but by various state and federal governmental units. Although the rates were protested by some barge lines, certain large receivers of grain by barge, the Tennessee Valley Authority, flour milling interests and certain boards of trade outside the Southeast, and others who expected to feel their competitive impact, they were enthusiastically supported by the United States Department of Agriculture, the Southern Governors' Conference, the Southeastern Association of Railroad and Utility Commissioners, state regulatory commissions throughout the South and in many of the Western grain growing states, numerous farmer organizations and receivers and users of grain throughout the Southeast.

Respondent's case-in-chief was completed February 8, 1962; that of protestants on June 11, 1962. Respondent's rebuttal case, largely prepared in writing and submitted to protestants in advance, ended on August 29, 1962, at which time the hearing closed. A large portion of the time devoted to respondent's case-in-chief and rebuttal was taken up with extended cross-examination by the protestants of witnesses for respondent and supporting intervenors. (R. 23-24)

On July 27, 1962, petitioners filed in the District Court for the Northern District of Alabama a complaint seeking to enjoin the rates, following the expiration of the statutory suspension period, until such time as the Commission should have entered its deci-

sion.[4] (R. 4-12) The Interstate Commerce Commission did not join in the complaint, nor did it participate in the litigation by way of intervention or as *amicus curiae*. Respondent answered and moved to dismiss, urging that under the Interstate Commerce Act the exclusive authority to suspend rates filed by a carrier is lodged in the Interstate Commerce Commission.

On August 2, 1962, the court denied petitioners' application for a preliminary injunction, holding that it had no authority to grant the relief sought,[5] and on September 7, 1962, the Court of Appeals for the Fifth Circuit unanimously affirmed, characterizing the relevant statutory provision, Section 15(7) of the Interstate Commerce Act, as "a model of clarity." (R.

[4] In their complaint, which, as noted above, was directed to four defendants, petitioners charged *inter alia* that the new rates were the product of a conspiracy unlawful under the antitrust laws. In this Court petitioners have completely abandoned this charge, no doubt in part because of its inherent incredibility in light of the lack of enthusiasm of the other railroads, lacking respondent's special equipment, for the new rates, and in part because of the specific provision of § 16 of the Clayton Act, 15 U.S.C. § 28, which prohibits maintenance of a private suit for injunction based on such grounds. See pp. 51-52, *infra*.

[5] The District Court found that denial of injunctive relief might subject petitioners to irreparable injury. (R. 58) Contrary to the Government's suggestion (Gov't Br. p. 12n.), however, it did not find the kind of "extreme hardship," going well beyond accepted standards and concepts of irreparable injury, that the Government urges as alone justifying judicial intervention. And it is significant that the court made no findings, and apparently gave no consideration, to the countervailing equities, in terms of irremediable injury to individual shippers and to the economies of the Southeastern states as well as to respondent, that would result from an injunction against the rates, particularly in light of their previous involuntary suspension for a seven-month period.

121) On October 16, 1962, this Court granted a petition for certiorari to review this judgment.[6] (R. 143)

SUMMARY OF ARGUMENT

The statutory language which controls this case could scarcely be plainer. Section 15(7) of the Interstate Commerce Act, grants to the Interstate Commerce Commission the authority to suspend new rates filed by a railroad for a maximum period of seven months and expressly provides that at the end of that period the rates "shall go into effect" even if the Commission's investigation of them has not been completed.

The terms of the statute, prescribing a limited period of suspension after which rates are to be permitted to go into effect without judicial interference, reflect a conscious accommodation by Congress of conflicting interests. Acceptance of petitioners' position that the time limitation on the suspension power is illusory because the courts are free to disregard it would not only require a disregard of unequivocal language but would skew the balance that Congress so carefully struck.

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[6] Despite the holding of both courts below that petitioners were not entitled to injunctive relief against respondent's rates, brief restraining orders issued by the courts below and an extension of those orders granted by Mr. Justice Black have to date given petitioners the full measure of relief sought by their complaint. This has happened without respondent's being protected by the kind of bond to which it clearly would be entitled if an injunction were issued on the merits, against losses resulting from its inability to put its rates into effect between the expiration of the suspension period and the date of their approval by the ICC.

The Government expressly notes that if petitioners are to be given the relief they seek that relief "might be accompanied by appropriate conditions, such as the posting of a suitable bond." (Gov't Br. p. 46)

The legislative history of what is now Section 15(7) of the Interstate Commerce Act confirms Congress' intent, clearly expressed in the words of the statute, that the Commission's suspension power is to be exclusive, and that the courts are not free to lengthen the period of suspension by way of injunction. That history shows that Congress deliberately rejected, on the one hand, a suspension period so short as not to be truly meaningful and, on the other, a suspension lasting, as petitioners would here have it last, until the Commission finished its investigation and approved the new rates.

Within a year of the adoption of what is now Section 15(7) the Interstate Commerce Commission construed it as precluding suspension other than by the Commission. The Commission takes the same position today. And this Court, in *Board of R.R. Comm'rs* v. *Great Northern Ry.*, 281 U.S. 412, 429, has ruled that the power of suspension "was entrusted to the Commission only."

Upon petitioners' reading of the statute, Congress would have acted quite irrationally. For although it concededly granted the sole authority initially to suspend rates to an expert administrative agency and carefully limited that authority in point of time, on petitioners' view it would at the same time have decided that the courts—less competent than the agency itself to make the judgments necessary to determine whether suspension should be granted—should be free to ignore the time limitation on the agency's authority. There is no justification for disregarding explicit statutory language to reach this bizarre result.

The "related statutes" on which petitioners rely have no bearing on the proper construction of Section 15(7). The National Transportation Policy is a directive to

the Interstate Commerce Commission, and here it is conceded that the Commission has no duty or authority to take any action. Section 22 of the Interstate Commerce Act, 49 U.S.C. § 22, is of no help to petitioners because the remedy which they seek can on no view be characterized as one that existed at common law prior to the passage of the Interstate Commerce Act. And the implications which petitioners seek to derive from the statutory provisions for review of Interstate Commerce Commission orders, 28 U.S.C. §§ 2324, 2325, are unwarranted both because petitioners misconstrue those provisions and because in any event they would not support the granting of an injunction by a single judge prior to any Commission decision or order.

Petitioners' argument that denial of injunctive relief would raise "grave constitutional difficulties" is without merit. The interest petitioners seek to assert is no more than the interest in being free from competition, and this interest is not protected by the Constitution.

ARGUMENT

I.

CONGRESS DELIBERATELY VESTED IN THE INTERSTATE COMMERCE COMMISSION ALONE THE POWER TO SUSPEND THE EFFECTIVENESS OF NEW RAILROAD RATES AND CONSCIOUSLY LIMITED THAT POWER IN POINT OF TIME

This case presents a question of the proper construction of a statute that the court below correctly characterized as "a model of clarity."

The statute involved, Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), provides that when a tariff setting forth a schedule of rates is filed by a carrier the Interstate Commerce Commission, upon

complaint or upon its own initiative, may enter upon a hearing concerning the lawfulness of any rate, fare, charge, etc., embodied in the tariff and, pending its hearing and decision,

> "upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; . . . If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, classification, regulation, or practice shall go into effect at the end of such period."

Statutory language could scarcely be plainer. By this section Congress has confided to the Interstate Commerce Commission the power to suspend for a limited period rates filed by railroads while it investigates their lawfulness. That power is confided "to the Commission only." *Board of R.R. Comm'rs* v. *Great Northern Ry.*, 281 U.S. 412, 429. As this Court, speaking through Chief Justice Hughes, declared in the cited case:

> "When, before the amendments of 1910 of the Interstate Commerce Act, the question arose as to the propriety of judicial action in granting injunctions against the maintenance of interstate rates, filed and published by carriers as provided by law, pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, al-

> though temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this Court in the *Abilene* and other cases, *supra*. Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation [citations omitted]. *This power of suspension was entrusted to the Commission only.*" (Emphasis added).

The words of the statute, prescribing a limited period of suspension to be invoked in the discretion of the expert body entrusted by Congress with railroad rate regulation, after which rates are automatically to go into effect without further interference, reflect an accommodation of conflicting interests that Congress deliberately adopted after considering and rejecting other possible procedures and solutions. Acceptance of the petitioners' position that the time limitation on the suspension power provided in the statute is illusory—that it is, in fact, no limitation at all—would not only require a disregard of unequivocal language but would render largely meaningless the heated struggle that took place in Congress as to the appropriate maximum period for which the exercise of that power should be authorized and would skew the balance that Congress finally struck. It would substitute for the compromise that Congress deliberately adopted a principle whereby the risk of loss occasioned by the time lag necessarily involved in an adjudication by the Interstate Commerce Commission of the legality of reduced carrier rates would, instead of being equitably shared by those who stand

to gain and lose therefrom, fall wholly on the rate-making carrier and the public it serves. Indeed, it is noteworthy that even the Government has been unwilling to embrace petitioners' position in this respect, but rather has expressly conceded that it is apparent that Congress in adopting what is now Section 15(7) of the Interstate Commerce Act placed limitations not only on the power of the Commission to suspend carrier-initiated rates, but also on what the Government contends would otherwise be the authority of the courts to do so.[7]

A. SECTION 15(7) OF THE INTERSTATE COMMERCE ACT, INCLUDING THE TIME LIMITATION UPON THE INTERSTATE COMMERCE COMMISSION'S POWER TO SUSPEND RAILROAD RATES, REPRESENTS A CAREFUL BALANCING OF CONFLICTING INTERESTS THAT WOULD BE DISRUPTED BY JUDICIAL EXTENSION OF THE SUSPENSION PERIOD.

Section 15(7), as it has evolved since the substance of its provisions was added to the Interstate Commerce Act in 1910, is an expression of a carefully-formulated Congressional policy, designed to balance a number of conflicting interests.

The principle of carrier initiation of rates is preserved, but restrictions are placed upon that principle in the interests of shippers, the traveling public and competitors. Thus by this statute Congress "cut significantly into pre-existing rights of the carrier to set his own rates and put them into immediate effect . . . ," *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 479, by giving to the Interstate Commerce Commission a

[7] The Government has, however, refused to accept the inevitable consequences of its concession, and urges that although the authority of the equity courts in this area has been greatly diluted it has not been altogether extinguished. That this position is altogether untenable we shall demonstrate below.

wholly discretionary power to suspend carrier-initiated rates, a power the exercise of which another agency, acting under a statute modeled on Section 15(7), compared to "the issuance of a preliminary injunction." *Air Freight Forwarders Ass'n, Motions*, 8 C.A.B. 469, 474 (1947); see also *Suspension of Rates on Packing-House Products*, 21 I.C.C. 68, 70 (1911). When the power is exercised the carrier is deprived during the suspension period of the benefits its business judgment indicated that it would derive from new rates, and in the event of a rate reduction the public is likewise deprived of the benefits that the new rates would bring to it. This deprivation is irreparable, for neither carrier nor public is given any means of recouping that loss even though the new rate proves ultimately to be completely lawful.

It is not at all surprising that, in thus significantly limiting the rights of the rate-making carrier as they existed at common law, Congress was also concerned that the burden imposed by the new scheme of regulation should be to some extent distributed. It is natural, therefore, that Congress concluded that the suspension power should be limited in time—today to seven months, a period thought to be adequate in most cases to permit the Commission to make its determination of the lawfulness of the questioned rates. Thereafter the carrier was no longer to be required to bear the entire burden of the new system by being further denied the right to put the rates into effect. Persons who could demonstrate legally cognizable injury by reason of the rates were remitted to a remedy in damages should the rates prove to be unlawful, 49 U.S.C. § 8, and, in the event the rate change was an increase, shippers were given the additional protection

of a provision empowering the Commission to require the carrier to account for and refund rate increases that were subsequently found unlawful.

As we shall show below, this equitable compromise of competing interests was no mere accident. Congress was not haphazard. Rather it was deliberate, rejecting alike the alternatives of a suspension so short as not to be truly meaningful and a suspension lasting until the Commission finished its investigation and approved the new rates. And later, after several years of experience under the balance that it had struck, it amended, and thereafter again amended, the statute in response to the lessons of experience and changing circumstances. Throughout, it made the Commission the exclusive instrument for carrying out its policy, deliberately closing the door to the possibility of sporadic action by other instrumentalities of justice, which must inevitably disrupt the carefully-worked out statutory scheme.

B. THE HISTORY OF THE SUSPENSION POWER LEGISLATION CONFIRMS THAT ONLY THE ICC CAN SUSPEND A RAILROAD RATE AND ONLY FOR THE STATUTORY PERIOD PRESCRIBED.

When as here the statutory language is direct and unambiguous, and given its natural meaning produces an altogether rational result, there is no room for the kind of "construction" in which petitioners and the Government would have this Court engage. *Yates* v. *United States*, 354 U.S. 298. And by the same token, under these circumstances there is no occasion for resorting to legislative history to attempt to conjure up doubts as to the meaning of a provision that is plain on its face. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (concurring opinion); *United States* v. *Missouri P. R. Co.*, 278 U.S. 269. If one does

turn to the legislative history here, however, no shadow is cast upon the statutory language. Rather those sources confirm the meaning apparent on its face.

1. The Mann-Elkins Act.

What is now Section 15(7) of the Interstate Commerce Act came into that law as a provision of the second of the historic groups of amendments that made of the Interstate Commerce Commission a vital and effective regulatory body. This was the Mann-Elkins Act of 1910.

The first group of amendments was the Hepburn Act of 1906. That statute, among other things, gave to the Commission the power to prescribe maximum rates for the future, the power that this Court held in *ICC* v. *Cincinnati, N.O. & T.P.R. Co.*, 167 U.S. 479, the Commission lacked under the original Act to Regulate Commerce.

Although the Hepburn Act was a monumentally important step toward real rate regulation by the Commission, problems still remained. The Commission was empowered to act only upon complaint and as to a rate that was in effect. In a time of industrial recovery, when the carriers were increasing rates throughout the country, the Commission regarded as a serious deficiency its inability to place some restraint on such increases pending determination of their lawfulness. See 1 Sharfman, *The Interstate Commerce Commission* 49-52. So it was that in its annual reports beginning in 1907 the Commission urged Congress to grant it the power to suspend increased rates while it investigated them. ICC Ann. Rep., 1907, pp. 9-10; *id.*, 1908, pp. 10-12; *id.*, 1909, pp. 6-7.

The Commission noted that some shippers had attempted to plug the gap it saw in the Interstate Commerce Act by recourse to the courts. But it noted also that the courts disagreed as to whether relief by way of an injunction against a rate change pending a hearing before the Commission could be had.[8] The Commission went further and said that the makeshift judicial remedy, even assuming its existence, was altogether unsatisfactory and created serious problems of its own by way of "confusion and discrimination." See, *e.g.*, ICC Ann. Rep., 1909, p. 6.

The confusion and discrimination as to which the Commission expressed concern arose not only from the disagreement among the courts as to their power in the premises but also from the fact that, where jurisdiction was taken, the judicial power did not appear able adequately and equitably to cope with the problem presented. Thus, for example, carriers were sometimes compelled to maintain one rate in their published tariffs but collect another. ICC Ann. Rep., 1908, pp. 11-12. Further, in the case of joint or through rates where a plaintiff succeeded in obtaining jurisdiction over only one carrier party to the rate, that carrier might be enjoined from collecting the charge published in its tariff on file with the Commission, while at the same time its partner was obliged, at the risk of severe statutory penalties, to collect the charge specified in that tariff. *Id.*, p. 12. There was discrimination because in many

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[8] The cases are collected at p. 12 of petitioners' brief. The question was mooted in this Court but not decided in Southern Ry. v. Tift, 206 U.S. 428, and was finally set to rest in Board of R. R. Comm'rs v. Great Northern Ry., *supra*, where the Court approved the pre-1910 cases disclaiming jurisdiction and disapproved those in which jurisdiction had been found to exist.

cases not all affected shippers joined in the injunction suit, and therefore, in at least one instance, "an injunction has been issued in favor of the complainants alone, so that at the present time the general public is paying the advanced rate, while the complainants are being charged the old rate." *Id.*, 1907, p. 10.

Beginning with these pleas of the Commission itself to Congress for remedial legislation, with their recognition that the judicial remedy was not only insufficient but actually repugnant to basic purposes of the Act, three strands run through the history of the suspension provision of the Mann-Elkins Act insofar as that history is relevant to the question in this case.

First, there was general agreement that the suspension power should be confided exclusively to the Interstate Commerce Commission as the expert body that alone could assure uniformity in its exercise and bore the ultimate responsibility for rate regulation. The existing situation was satisfactory to no one. There was no disposition to continue to place any reliance upon the federal courts acting pursuant to a dubious kind of jurisdiction, which had not been sustained by this Court and was, indeed, disapproved by it in retrospect in *Board of R.R. Comm'rs* v. *Great Northern Ry., supra,* and which depended upon allegations of illegality that concededly raised questions appropriate for decision in the first instance only by the Interstate Commerce Commission, after hearing, and not by the courts.

Second, there was disagreement as to whether the Commission should be permitted to suspend a tariff filing for a limited time only or for the entire period required to conclude its investigation of the

questioned rate. At times the disagreement was sharp, particularly on the floor of the Senate where the debate over the bills that became the Mann-Elkins Act became embroiled in the mounting political dispute of that day between insurgent and regular Republicans. The advocates of a suspension power limited in time, who urged that shippers as well as the carriers should bear some of the risk of possible delay in the Commission's proceedings, prevailed. They did so, however, only after, as a compromise, the suspension period was substantially lengthened over what had been originally proposed in order that there might be time enough for the Commission to make its determination in most cases.

Third, it was specifically urged by the proponents of indefinite suspension and specifically acknowledged by the proponents of time-limited suspension that cases would arise in which the Commission would not finish its investigation within the suspension period, so that suspended rates would go into effect before their lawfulness was determined. Nevertheless, with the exception of a few isolated and ambiguous statements made on the Senate floor (see Pet. Br. pp. 8a-11a)—statements made, as we have noted, in the course of an intensely political debate that was thus likely on occasion to be distinguished more for its rhetoric than its logic—there was no suggestion on the part of those who advocated or were willing to accept a time-limited suspension power that the time limitation could be subverted by resort to the kind of lawsuits that had proved so productive of chaos. In short, there was no thought of giving back-handed statutory sanction to the very type of judicial actions that had brought the problem to a head. And even more clearly, there was not the

slightest indication on the part of any member of the Congress of a belief that, as the Government urges, the bill made possible the invocation of a judicial remedy with respect to rate suspension even if none had theretofore existed.

Early in 1910, President Taft, carrying out a campaign pledge, sent to Congress his recommendations for improving regulation of the railroads. Bills drafted by the Attorney General were introduced in both houses to carry out his recommendations. Much-altered in their course through the Congress, these bills became the Mann-Elkins Act of 1910. On the point here at issue, the President heeded the repeated requests of the ICC that the power to suspend tariffs be vested in it but advocated that the suspension period be limited to 60 days. 45 Cong. Rec. 378, 380.

Hearings were held on the bills by the interstate commerce committees of the two houses. At these hearings one of the principal proponents of the suspension provision was Mr. J. C. Lincoln, president of the National Industrial Traffic League. Speaking for that nationwide organization of shippers, he was emphatic that "the power of suspending proposed rates," which he noted had been exercised by some of the federal courts, "should be placed with the Interstate Commerce Commission, a body better able to determine the equities of the case than the courts, their entire study being one of transportation."[9] *Hearings on Bills Affecting Interstate Commerce, Before the House Interstate and Foreign Commerce Committee,* 61st Cong., 2d Sess. 438. Although

[9] This is plainly language of substitution, not mere supplementation.

some of the members of his organization favored indefinite suspension and he personally thought the suspension period should be ninety days, *Hearings on S. 3776 and S. 5106 Before the Senate Interstate Commerce Committee*, 61st Cong., 2d Sess. 58, 59, his formal position was that the suspension period should be limited to sixty days. *House Hearings, supra* at 438. He took this position in the full knowledge that not every case could be decided in that period but, at the same time, without the slightest hint that the kind of haphazard judicial injunctions of which he was quite aware might be used to supplement the Commission's power when the suspension time proved inadequate.

In a colloquy with Chairman Mann of the House committee, Mr. Lincoln was as much as invited to suggest the availability of a judicial remedy as a supplement to the limited power of the ICC, but he declined the invitation.

> "THE CHAIRMAN. But the commission has no authority to keep anything in status quo after sixty days' time.
>
> "MR. LINCOLN. They have not, if the railroad insists on putting in its advance; but if the railroad has been favorably impressed with the arguments received they would no doubt ask for authority from the commission to take an extension of the time.
>
> "THE CHAIRMAN. But if the railroad was obstinate, it might go on; you could not prevent that?
>
> "MR. LINCOLN. No; not after sixty days, unless it was settled before the expiration of the sixty days . . . ." *House Hearings, supra* at 445.

The ICC, which in its annual reports had seemed to suggest suspension until its investigation was concluded, ultimately recommended to the Congressional

committees that instead the sixty-day suspension period urged by President Taft be lengthened to 120 days. See S. Rep. No. 355, 61st Cong., 2d Sess., pt. 1, p. 9. The House committee adopted this suggestion in the bill it reported to the floor. H.R. Rep. No. 923, 61st Cong., 2d Sess. 11. The Senate committee initially adhered to the President's sixty days, S. Rep., *supra*, pt. 1, pp. 8-9,[10] but on the floor accepted 120 days as a committee amendment, 45 Cong. Rec. 6463-64. Two insurgent Republicans, however, urged in a minority report an indefinite suspension power. S. Rep., *supra*, pt. 2, p. 9. This disagreement within the Senate committee set the stage for the debate on the Senate floor over the terms of the grant of the suspension power.

On behalf of the insurgent Republicans, Senator Cummins, who was one of the committee dissenters, offered an amendment whereunder all rate increases would be suspended "until after full hearing" by the ICC. 45 Cong. Rec. 6409.[11] He and his fellow insurgents emphasized that (a) it was unfair to require shippers to pay increased rates that had not been approved by the Commission, (b) the Commission could not be ex-

[10] The majority report noted that the suspension power proposed in the bill was a new one which should be limited to "a reasonable period," and that the 60-day period proposed was believed to be reasonable because it was "a length of time which can not possibly work any serious hardship to the railroad companies, and which, on the other hand, will afford the commission opportunity with due diligence to complete or, at all events, to make substantial headway in any such investigation."

[11] The discretionary power of the ICC to investigate and suspend for a limited period would have continued to apply to rate changes other than increases. *Id.* at 6777.

pected to complete its proceedings even in 120 days, (c) reparations were not an adequate remedy and (d) the railroads were better able than the shippers to bear any loss resulting from delay in the Commission's proceedings. See *id.* at 3373-75, 6500-01, 6510-11 (Senator Cummins); 5329 (Senator Dolliver); 6900-01 (Senator LaFollette).

On the other side it was urged that an indefinite suspension was unfair to the railroads, which could not recover the losses incurred during the suspension period even though the increased rate eventually was approved, and that the ICC might, under the amendment, prevent rate increases simply by failing to complete its investigation. *Id.* at 3472, 6503 (Senator Elkins); 4109-10 (Senator Root); 6509, 6787-88 (Senator Sutherland); 6782 (Senator Jones). In the course of debate on the Cummins amendment there began to be talk of a compromise whereby the suspension period would be increased to six months. It was suggested further that this might be accompanied by a provision that if the railroads could not convince the Commission of the validity of an increase within that period the increase would be denied. See *id.* at 6783-84, 6788, 6789.

Senator Clarke opposed this refinement and urged that if the six-month period was adopted, rates should go into effect upon its expiration even if the ICC had not by then acted. In doing so he restated the reasons that underlay the limited suspension proposals. Thus, he said, "there is no particular injustice in allowing the railway company" to charge the new rates after six months if the hearing was not completed by then, and by that time the railroad "has endured about as much of the loss and inconvenience incident to an effort to promote the public good as justice and fair dealing

require." Moreover, he said that "if there be a hardship in a controversy of that sort arising from the inefficiency or imperfection of the remedies, it ought to be shared to a certain extent, particularly as the public always have the final remedy in the power of the commission to fix the proper rate when it shall get to the end of the controversy." *Id.* at 6787; see also *id.* at 6782 (Senator Jones). Here again the approach is one of compromise, for there is no suggestion that the shippers might simply deposit their share of the burden of hardship upon the carrier by resort to the courts.

Finally, the Cummins amendment was put to a vote and defeated. *Id.* at 6915. Meanwhile, Senator Jones had proposed an amendment whereby the 120-day suspension period could be extended for an additional period up to six months, *id.* at 6847, and Senator Paynter had offered an amendment requiring the carriers to keep accounts of the amounts collected under rate increases that became effective prior to the ICC decision and refund such amounts to the shippers if the increases were disallowed, *id.* at 6916.

Senator Elkins, the committee chairman and the floor manager for the bill, announced his support of the Jones amendment, which he described as "fair and just." *Ibid.* Immediately thereafter in answer to questions Senator Jones stated explicitly and without objection that under his proposal rates would go into effect upon expiration of the suspension period if the Commission's hearings had not been completed. *Id.* at 6916-17. Senator Jones then accepted the Paynter amendment, dealing with keeping accounts and making refunds, as an addition to his own. *Id.* at 6920-21. The Jones amendment, as thus supplemented, was adopted unanimously. *Id.* at 6921.

Thereafter, during its consideration of the provisions of the bill creating the Commerce Court the Senate defeated an amendment offered by Senator LaFollette that would have given the Commerce Court the authority to grant the kind of remedy sought by petitioners here, by conferring on that court jurisdiction of suits by shippers or other interested persons to suspend or enjoin rates pending a final determination by the ICC, where it appeared that enforcement of the rate would deprive the complainant of property without due process of law or just compensation or cause him irreparable injury, and the ICC either had not suspended or did not have the power to suspend the rate. See *id.* at 7260-64. Then the bill, including the supplemented Jones amendment, was passed, 50-12. *Id.* at 7375.

In the House, where the floor debate on this provision preceded that in the Senate, the principal dispute also concerned whether the suspension power should be limited in time—to 120 days under the bill reported by the House committee—or should be indefinite. The same considerations as were advanced in the Senate were urged in the House on both sides. See *id.* at 5163, 5843-49. The upshot was that an amendment providing for an indefinite suspension period was defeated by a vote of 92-62, *id.* at 5849, and the House bill as passed contained the 120-day suspension period, *id.* at 6032-33.

In the conference the Jones amendment adopted in the Senate, empowering the Commission to suspend for an additional six months beyond the 120 days allowed by both bills, was retained, but without the Paynter record-keeping and refund supplement. 45 Cong. Rec. 8239, 8473. Once more it was made clear that rates

would go into effect if the Commission had not acted at the end of the suspension period, which might be as long as ten months, 45 Cong. Rec. 8370, 8387, and on this understanding the conference committee version of the bill was adopted by both houses, 45 Cong Rec. 8391, 8485.

Senator Cummins, who had fought so hard for an unlimited period of suspension, specifically recognized the nature of the compromise made by the bill. He summarized the provision in its final form by stating that "under this bill—and it was the best we could do—all increases in rates go into effect at the end of ten months, if the commission has not during that period been able to pass upon them." 45 Cong. Rec. 8387.

Section 12 of the Mann-Elkins Act, then, as finally enacted, amended Section 15 of the Interstate Commerce Act to authorize the Commission to investigate a newly-filed rate, charge, etc., upon complaint or on its own initiative and to provide further that the Commission, pending its hearing and decision,

> "may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided*, That if any such hearing can not be concluded within

the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months." 36 Stat. 552.

In seeking the solution to the question posed by this case, there is much to learn from these pages of history. For we stand on a battlefield of an earlier day, where the deepest insight comes from knowledge of what the fight was about.

In the battle that we have reviewed the issue was where the power should reside to change rates—in the railroads or in the Interstate Commerce Commission. The insurgents battled to empower the Commission, and the Commission alone, to control the process of rate change, by providing for automatic or discretionary suspension of rates filed by the railroads until it had investigated them and found them reasonable and non-discriminatory. The Administration fought to secure so far as it could the railroads' prerogative of putting rates into effect and litigating their legality afterward.

We have seen that the Administration started by offering a suspension period of sixty days. The insurgents demanded unlimited suspension until Commission decision. The Administration doubled its offer—four months. It was not accepted. Then the extreme insurgent position was defeated in the Senate. The moment for compromise had arrived. It proved to be an expensive one for the Administration, for the already doubled period of suspension had to be raised one hundred and fifty per cent to ten months. But in this compromise each side won something of value. One side won the principle that, after a specific

maximum period of suspension, the railroad was secured in the absolute right to put its rates into effect even though the Commission was still considering them. The other side won a period of suspension long enough so that in most, although as both sides recognized not all, cases the Commission could complete its investigation within it. But to assert that this whole battle was only a pillow fight, because all the time the contestants were reserving to the courts the right to extend any period of suspension, is to distort history. And indeed, petitioners are able to array just two isolated statements on the Senate floor that are claimed to indicate that Congress actually intended to permit the courts to be free to lengthen the period of suspension it had so painfully agreed to.[12]

The first of these is a response by Senator Heyburn to Senator Cummins' advocacy of indefinite suspension. 45 Cong. Rec. 6777 (Pet. Br. pp. 8a-9a). A reading of the statement will show that so far as equitable jurisdiction in the courts is concerned, Senator Heyburn asked Senator Cummins *not* whether it existed generally, but only whether it existed in the special case where the railroad was evidently seeking by a proliferation of evidence to delay and impede the

[12] The third statement adverted to in petitioners' brief (p. 7a) deals not with the question of the courts' power to suspend under the bill but rather with one Congressman's views as to the scope of judicial power prior to the statute's passage. With this statement may be contrasted that of Representative Mann, floor leader for the bill in the House, who while explaining the Committee proposal expressly noted that "under existing law there is no method by which you can prevent the proposed new rate continuing in force while the commission is investigating the subject as to whether the rate ought to remain in force." 45 Cong. Rec. 4711. See also the comments of Representative Cole at 45 Cong. Rec. App. 88. (Gov't Br. p. 31)

Commission investigation, and when Senator Cummins expressed "grave doubt" that it did, indicated a belief to the contrary.[13] That is not the question presented in this case, and accordingly this passage, even if authoritative, would have no relevance here.[14]

The remarks of Senator Elkins (Pet. Br. pp. 9a-11a) are those of the floor manager of the bill and thus would be entitled to weight—if they were clear and, given the construction petitioners urge, not inconsistent with the terms of the statute and the overwhelming preponderance of the legislative history. They are neither.

The remarks were addressed to Senator LaFollette's amendment to give the new Commerce Court created by the bill a power of suspension in some situations, including cases in which the ICC had not exercised its power to suspend. (See p. 28, *supra*). As petitioners read the passage the remarks suggest that Senator Elkins believed that the LaFollette amendment was

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[13] The Government points to additional remarks by Senator Heyburn at 45 Cong. Rec. 6793-94 (Gov't Br. p. 32). It is difficult to understand how these remarks aid the Government's position, since (1) they express what the Government recognizes to be the mistaken view that shippers had a *statutory* injunctive remedy against carrier rates prior to the passage of the Mann-Elkins Act, and (2) they in no way support the distinction which the Government seeks to draw between different degrees of irreparable injury. What is significant is that the Government cites no passage in the legislative history which even remotely suggests that Congress, or any member of Congress, intended, as the Government urges, that under the bill as passed there should be a remedy in the courts even if none had theretofore existed.

[14] Petitioners do not claim that respondent is responsible for any delays in the Commission proceeding involved here not compensated for by voluntary extension of the suspension period. (Pet. Br. p. 6).

unnecessary because the powers which it would confer already existed in the regular federal courts. Whether they did was of course even then highly dubious, as we have already noted, and later this Court ruled in *Board of R. R. Comm'rs* v. *Great Northern Ry., supra*, that they did not. In any event, it is perfectly clear that whatever power the courts may have had prior to 1910 to restrain the effectiveness of rates in the first instance did not survive the Mann-Elkins Act.[15] *Director General* v. *The Viscose Co.*, 254 U.S. 498; *M. C. Kiser Co.* v. *Central of Ga. Ry. Co.*, 236 Fed. 573 (S.D. Ga. 1916), *aff'd*, 239 Fed. 718 (5th Cir. 1917). Thus petitioners are placed in the unhappy position of placing the heaviest reliance on a statement that even construed as they would construe it makes two closely related points one of which—a continued judicial authority initially to suspend rates—they necessarily disavow even while embracing the other.

Further, a reading of the passage shows that it does not support the construction petitioners would place upon it[16] and that indeed it is not susceptible of any clear construction. Under these circumstances it is particularly noteworthy that on the very page of the Congressional Record on which the cited passage appears Senator Elkins stated flatly that under the bill "if the commission does not finish its hearing and in-

[15] See also the remarks of Senator Burton, 45 Cong. Rec. 7262, which might also be thought to support petitioners' position but which are similarly inconsistent with the settled rule stated in the text.

[16] Thus, for example, that construction is hardly consistent with the statement at the close of the remarks that "it is impossible to carry out in the courts what is in the Senator's mind through the wording of this amendment."

vestigation [during the first 120 days of suspension] it may take six months longer, after which, if no decision is made, the rate goes into effect. . . . The commission is the tribunal provided by Congress for the protection of the shipper."[17]

Only eight months after the enactment of the Mann-Elkins Act the Interstate Commerce Commission had occasion to construe the new suspension provision. The Commission unequivocally found that the purpose and result of that provision was not merely to supplement, but altogether to displace any judicial power that might theretofore have existed in the premises. Thus the Commission stated that:

> "[T]he Federal courts [before 1910] found themselves embarrassed by the appeals made to their equity powers against such [rate] increases. The courts differed upon the fundamental question of jurisdiction. In the cases where the courts assumed jurisdiction there resulted the greatest discrimination as between individual shippers and carriers, for as to some the increased rate was in effect, while as to others it was not in effect. With such a history before it Congress deemed it advisable

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[17] Also noteworthy are the terms in which Senator Sutherland replied to Senator LaFollette's proposal:

> "If the Interstate Commerce Commission makes a decision, the effect of which is to deprive the shipper of his property without due process of law, then I can see some occasion for his going to the court. But pending the determination of the Interstate Commerce Commission, which is constituted for this precise purpose, I see no reason whatever for extending to the shipper the right to go to court." 45 Cong. Rec. 7261.

Even the Government grudgingly concedes that this passage "intimated that the administrative remedy was exclusive no matter how long the hearing . . . ." (Gov't Br. p. 34)

> to lodge with this Commission, which alone under the *Abilene case*, 204 U.S., 426, has power to determine the reasonableness of a rate, the power to restrain for a time an increased rate until a determination can [b]e had as to whether this rate conforms to the requirement of the statute or is but the evidence of the exercise of an arbitrary power.
>
> ". . . The power to suspend is ancillary to the general power of investigation, it being the mind of Congress that it was a healthier and wiser policy that there should be a reasonable exercise of such power of suspension than that either the courts should continue to inadequately deal by injunctive process with a problem the ultimate solution of which did not rest within their purview, or that the shipping public should be subjected to continuing instability of rates and consequent commercial disturbance." *Advances in Rates—Western Case*, 20 I.C.C. 307, 313-14 (1911).

Such a contemporaneous construction, reflecting so clearly the informed understanding of the time, would be decisive even were the statute far less clear and explicit than it is. And it is to be noted that the Commission continues to adhere to the same position today. (Gov't Br. p. 1).

2. The Transportation Act of 1920

The first significant amendment to the railroad tariff-suspension provisions of the Mann-Elkins Act was made by the Transportation Act of 1920.[18] In this stat-

[18] During and immediately after World War I the suspension provision was largely if not altogether inoperative. By the Act of August 9, 1917, 40 Stat. 270, 272, Congress added a proviso by the terms of which rate increases could not be filed without advance approval of the Commission. The proviso was to be effective only until January 1, 1920, and was designed to give

ute, after the period of wartime federal control of the railroads, Congress opted for resumed private management under regulation designed not narrowly as before to curb abuses but affirmatively to encourage adequate transportation service. See *New England Divisions Case*, 261 U.S. 184, 189.

Congress took the occasion to overhaul various existing provisions of the Interstate Commerce Act, and Section 418, 41 Stat. 487-88, amended Section 15 of the Act. The paragraph dealing with investigation and suspension of rates became Section 15(7), as it now is, and the following language was substituted for the proviso to the original Mann-Elkins Act section:

> "If any such hearing can not be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by

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Congress the opportunity to "thrash out the problem and decide whether it wants to change the law or not." 55 Cong. Rec. 5810. This proviso was in substance superseded by the wartime assumption of federal control of the railroads. 40 Stat. 1733, 1734. Under the Federal Control Act, 40 Stat. 451, 456, the President, who acted through the Director General of Railroads, was empowered to initiate rate changes that went into effect without advance approval and could not be suspended by the Commission. See generally 1 Sharfman, The Interstate Commerce Commission 59 n. 61, 162-64.

> whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified . . . ."

Thus, (1) the possible period of suspension was reduced from ten months (120 days plus six months) to five months (120 days plus 30 days), (2) the statute was made to provide explicitly that a rate "shall go into effect" at the end of the period if the Commission had not concluded its proceeding and entered an order, and (3) the substance of the Paynter amendment, which had been rejected by the conferees on the Mann-Elkins Act (p. 28, *supra*), was adopted and gave additional protection to shipper interests by authorizing the ICC to require the keeping of accounts and refunds [illegible] he proceeds of rate increases found unlawful after [illegible] into effect.

The reduction in the possible period of suspension was advocated by, among others, Commissioner Clark of the ICC. Bespeaking the judgment of the Commission on a bill that provided for suspension for 120 days altogether, *Hearings on H.R. 4378 Before the House Interstate & Foreign Commerce Committee*, 66th Cong., 2d Sess. 30-31, he told the House committee:

> "[R]ecognizing the fact that if the carrier proposed increased rates that are finally found to be reasonable, the suspension of them for 10 months and depriving the carrier of the revenue thereunder for that period is not exactly fair, accompanied by the fact that if the rates are permitted to go into effect and are later found to be unreasonable the shipper may be awarded reparation, whereas

> the carrier cannot possibly collect the higher rates for any traffic that moved prior to the time at which they become effective upon a finding that they were reasonable, it is here proposed that the right of the commission to suspend the operation of such rates or schedules shall be limited to a period of 120 days."

In the same spirit of compromise that emerges so clearly from these words, he went on to say that after the suspension period the new rates would become "automatically effective" and that "if within that 120 days the matter cannot be decided, the rates will go into effect, but the investigation will proceed and the decision of the Commission will be made after the rates have gone into effect." *Id.* at 31; see also *id.* at 91.[19] The floor manager for the bill in the House, Representative Esch, also expressed the view that ten months' suspension was unfair to the railroads, stated that "the increased rates go into effect nevertheless" if the Commission had not decided the case by the expiration of the 120 days and saw the refund requirement as an offsetting advantage to shippers. 58 Cong. Rec. 8317.

Although there was considerable discussion before the committees of both houses of the desirable length of the suspension period and recognition that whatever the period there would be cases in which the Commission had not entered an order by its expiration, *House Hearings, supra* at 1223-24, 1625-28, 2235-38, 2944-45; *Hearings on Extension of Time for Re-*

[19] See also the testimony of the President and General Solicitor of the National Association of Railroad and Utility Commissioners that under the bill if an investigation were not completed at the end of the suspension period "the rates must go into effect . . ." *Id.* at 1626.

linquishment by the Government of Railroads to Corporate Ownership and Control Before the Senate Interstate Commerce Committee, 66th Cong., 2d Sess. vol. 1, pp. 511-12, 738, vol. 2, pp. 108-09, 1953-54, there was no suggestion on any side that the period might be lengthened in some cases by judicial action.

In explaining its reconciliation of differences between the Senate and House bills,[20] the conference committee, like Commissioner Clark and Representative Esch, said that under both versions, at the end of the suspension period the rates "were to go into effect whether or not the Commission had concluded its hearing . . ." H.R. Rep. No. 650, 66th Cong., 2d Sess. 66. And, of course, the statute was made to say exactly that.

Petitioners and the Government both seek to avoid the effect of the unequivocal words of the amended statute—"the proposed change of rate . . . shall go into effect"—by contending (Pet. Br. p. 21; Gov't Br. p. 22) that they refer only to Commission action, but that is not what the words say. Also, ignoring the testimony of Commissioner Clark, the remarks of Representative Esch and the authoritative report of the conference committee, petitioners seize on the fact that in explaining the bill at the opening of the Senate debate, its sponsor, Senator Cummins, did not refer to the "shall go into effect" phrase as making a significant change. This is not at all surprising. The phrase merely spelled out what the statute had provided since 1910, as Senator Cummins, the 1910 advocate of indefinite suspension, was well aware. He had been clear then that the Commission's power was ex-

[20] Only the House bill included the record-keeping, refund provision, and it provided only for 120 days' suspension. The Senate's inclusion of the additional 30-day possible suspension was accepted.

clusive (see p. 29, *supra;* Pet. Br. pp. 8a-9a), and his belief had been confirmed by the only court that had considered the subject between 1910 and 1920, *M. C. Kiser Co.* v. *Central of Ga. Ry.*, 236 Fed. 573 (S.D. Ga. 1916), *aff'd*, 239 Fed. 718 (5th Cir. 1917),[21] and by the Interstate Commerce Commission itself, *Advances in Rates—Western Case, supra.*

Indeed, the fact that there was no comment on or discussion of this new phrase is itself the strongest possible support for the view that if any legislator had earlier been of the view that the 1910 statute did not preclude judicial intervention he was either of that view no longer or willing to accept a change without objection. For it is inconceivable that this language, which to both courts below was so clear as to foreclose any argument that a judicial remedy could exist consistently with it, would not once have been questioned or challenged if any significant body of legislators believed, or intended, that in fact new rates should ***not*** go into effect at the end of the suspension period if a court could be prevailed upon so to decree.

3. The 1927 amendment

In 1927 the Interstate Commerce Commission informed Congress that "it was unable to make the necessary investigation and determination" within the period prescribed in Section 15(7) as amended in 1920. S. Rep. No. 1508, 69th Cong., 2d Sess. 4. In response Section 2 of the Act of March 4, 1927, 44 Stat. Pt. 2, 1447-48, amended Section 15(7) to make it read as it now does in its pertinent provisions. Testifying in sup-

[21] See 236 Fed. at 576. "The court is inclined to think the intention of Congress was to make the remedy provided by the amendment exclusive."

port of the bill, which lengthened the maximum permissible suspension period from five to seven months, Commissioner Esch noted that "the present law provides an aggregate period of 5 months, after which suspended rates automatically become effective, unless the Commission shall have previously passed thereon or unless the carrier voluntarily postpones the effective date for a longer period."[22] Moreover, the "shall go into effect" phrase was so placed that, as petitioners acknowledge (Pet. Br. p. 22), it is no longer susceptible at all to their strained argument that it refers "to a sequence of events in terms of Commission action alone" (*id.* at 21). Again, no voice was heard to inquire about, or to protest, this language, which even petitioners implicitly concede was now on its face susceptible of no construction save one contrary to their view.[23]

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[22] Hearings on H.R. 6359 Before the House Interstate and Foreign Commerce Committee, 69th Cong., 1st Sess. 8. This statement is particularly noteworthy because (1) Commissioner Esch had seven years earlier as a member of the House of Representatives been floor manager for the 1920 bill, and (2) although the Commissioner expressly adverted to a situation wherein rates would not become effective at the end of the suspension period, he did not mention as another such circumstance a judicial extension of that period.

[23] It is significant that even though the Senate committee that considered the ICC's request said the purpose of suspension was "to prevent the new rate from becoming effective until the question of its justness and reasonableness can be determined," S. Rep. No. 1508, 69th Cong., 2d Sess. 4, Congress retained the concept of a time-limited suspension power and made the statute reflect even more clearly than before, as pointed out in the text, recognition that there would be cases in which the investigation was not concluded within the suspension period and that rates under investigation should nevertheless go into effect upon the expiration of that period.

As we have indicated, petitioners maintain that the statutory language and the legislative history that illuminates it leave them unscathed because they deal not with judicial power but rather solely with the authority of the Interstate Commerce Commission. Although this position is, as we have shown, erroneous, it at least has the virtue of internal consistency. The Government, on the other hand, has rejected petitioners' position but at the same time has refused to accept the inescapable consequence of that rejection, the conclusion that the statute means what it says in providing that after the suspension period has expired the rates "shall go into effect . . . ." Rather, the Government would apparently seek to introduce to equity jurisprudence an altogether new concept—one, so to speak, of *extremely* irreparable injury, or "virtual destruction of the complainant.[24] (Gov't Br. p. 45). Applying this standard, the Government would rewrite the statute to say that at the end of the suspension period theretofore suspended rates shall almost, but not quite, always be permitted to go into effect.

Support for this novel position is said to be found in the fact that Congress is not shown in the course of its debates extensively to have discussed the case of rate-caused injury of a kind that the Government hypothesizes and urges to be alleged in this case; that is, not merely irreparable injury of a degree that under tradi-

[24] The Government at several points in its brief seems to suggest as an additionally relevant standard the prospect of "gross discrimination against shippers and localities." (See, *e.g.*, Gov't Br. p. 15) It seems apparent that any such standard is of no relevance per se; it at most could be relevant only to the extent that the kind of injury which the Government postulates can be demonstrated to result from it, for in itself it is a standard not of injury but rather of legality.

tional principles would justify the intervention of equity, but injury far more severe. (Gov't Br. p. 23) This fact, however, is altogether without significance for these reasons: first, on no reading can the relevant statutory language be said to permit of the distinction the Government seeks to draw, and second, the Government has altogether failed to demonstrate that at the time of the adoption of the statute the legislators recognized the existence of any distinction between the standard it would here apply and the familiar equity concept of irreparable injury. Particularly absent such a demonstration, a Congressional determination that judicial intervention and interference should be precluded even in cases of irreparable injury—a determination that the Government concedes—must be deemed to be a determination that such intervention and interference should be precluded no matter what the degree of potential injury shown.[25] For to hold otherwise would be to introduce a distinction and draw a line which the Government does not suggest any way of deriving from the terms of the statute and which by hypothesis could not have been in the minds of the legislators. That such a step would be unjustified becomes especially apparent when it is recognized that the Government urges not simply, as do petitioners, that Congress did not in the statute extinguish a previously existing remedy, but that the effect of the statute was to permit utilization of a judicial remedy even if such a remedy ~~could not have~~ been invoked prior to its passage.

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[25] The Government expressly concedes that "Congress can hardly have failed to perceive that substantial and sometimes irreparable hardship was bound to fall upon one side or another" (Gov't Br. p. 12), and recognizes that Congress determined, in these situations anticipated by it, that there should be no judicial power to restrain rates.

At bottom, the Government's position amounts to no more than speculation that if it had specifically focused on the most egregious possible case of irreparable injury Congress, while adhering to what is conceded by the Government to be its command that rates are to go into effect at the end of the suspension period despite the prospect of "ordinary" irreparable injury, would have been moved to carve out an exception to that rule. This argument is on its face one addressed to legislative rather than judicial considerations, and to a degree even greater than petitioners' position is incompatible with the terms of the controlling statute. In short, the statute either means what it says or it does not; the "it does and yet it doesn't quite" position of the Government is simply untenable.[26]

* * *

Since Section 15(7) took its final form this Court has construed it in *Board of R.R. Comm'rs* v. *Great Northern Ry.*, 281 U.S. 412, 429, as precluding suspension other than by the Commission, and the leading commentator on Interstate Commerce Commisson law has summarized it in the same terms.[27] Congress has used the section as a model for other regulatory statutes. In each instance the ICC or some other regulatory agency has been given the authority to suspend

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[26] What we have said applies with equal force to the Government's faint suggestion (Gov't Br. p. 20) that petitioners here might also have invoked the jurisdiction of a three-judge court.

[27] 1 Sharfman, The Interstate Commerce Commission 202, discussing the Act as it existed after its 1920 amendment:

> "Upon failure of the Commission to issue an order within this prescribed [suspension] period, the proposed changes in rates were automatically to become effective, although the Commission might continue its investigation and bring it to decision."

newly-filed rates for a limited period and it is provided that at the end of that period such rates are to go into effect, and it has never been suggested in the legislative history of any of these statutes or in cases under them that the period specified may be extended by judicial intervention. See Motor Carrier Act, 49 U.S.C. §§ 316(g), 318(e) (since 1935); Water Carrier Act, 49 U.S.C. § 907(g), (i) (since 1941); Freight Forwarders Act, 49 U.S.C. § 1006(e) (since 1942); Federal Communications Act, 47 U.S.C. § 204 (since 1934); Federal Power Act, 16 U.S.C. § 824d(e) (since 1935); Natural Gas Act, 15 U.S.C. § 717c(e) (since 1938); Federal Aviation Act, 49 U.S.C. § 1482(g) (since 1938). If petitioners prevail here, each of those statutes will presumably be affected, since all of them have their roots in the Mann-Elkins Act.

C. ACCEPTANCE OF PETITIONERS' ARGUMENT WOULD NECESSITATE ATTRIBUTING AN IRRATIONAL PURPOSE TO CONGRESS.

Petitioners' argument as to the statutory language ultimately rests on the fact that in Section 15(7) Congress has stated only the affirmative of the proposition that the new rate "shall go into effect at the end of [the suspension] period," and did not in so many words go on to add something like "and the courts shall not extend the period of suspension herein provided." They apparently urge that because Congress eschewed this redundancy, Section 15(7) should be read as if it went on to say "unless further suspended by the courts." As we have shown, the current of the legislative history runs strongly against this novel mode of statutory construction, as does the contemporaneous construction of the Interstate Commerce Commission and the decision of this Court in the *Great Northern Railway* case that the power of suspension "was entrusted to the Commission only."

Moreover, upon petitioners' reading of the statute, Congress would have acted quite irrationally. It confided to an expert administrative agency a power that has been likened to the extraordinary remedy of the preliminary injunction. Exercise of that power requires an informed balancing by the expert agency of such factors as the general transportation significance of the rates in question, the novelty or difficulty of the legal problems they present and the potential injury to interests public and private that will be occasioned by the exercise or withholding of the power. So far as the expert agency is concerned, however, no matter how strongly the balance might weigh in favor of suspension, the power to suspend was limited to a maximum of seven months.

Thus Congress concededly decided that no matter how strong the showing by those complaining against a tariff, the public interest in carrier freedom to initiate and change rates, and the equity of having shared the burden of delay in the outcome of litigation before the Commission, required that the authority of its chosen agent, the Commission, be flatly limited to seven months. Yet, on petitioners' view, Congress would at the same time have decided that the courts—even though most of the factors to be weighed by the agency are not within their competence—should thereafter be free to extend that seven-month period indefinitely.[28]

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[28] The Government's position, although ostensibly narrower, has the same ultimate consequences. Thus although the likelihood of "virtual destruction of the complainant" is conceded by the Government not to enlarge the suspension authority of the Commission, which as a body expert in transportation patterns and economics is plainly far better qualified that any court to determine whether such a likelihood exists, it is nevertheless said to provide an occasion for the exercise of judicial authority.

The strongest affirmative showing, wholly lacking here, should be demanded before such a bizarre intent is attributed to Congress. A court would indeed be justified in straining the construction of the statute to avoid such a result; it emphatically would be unjustified in disregarding explicit statutory language in order to reach it.

A premise of this aspect of the argument of both petitioners and the Government is that absent Section 15(7) the courts would have an inherent plenary power to prevent irreparable injury by preserving the status quo pending the completion of Commission rate proceedings.[29] Both petitioners and the Government concede that even if any such power would otherwise exist it is to some degree confined by Section 15(7). Thus petitioners and the Government have both acknowledged that the courts may not suspend rates in the first instance, where the ICC has refused or has not been asked to do so, and the Government goes further to acknowledge that in other than what it

[29] Petitioners and the Government reach this conclusion by very different routes. The position of the former appears essentially to be that the courts had the power to restrain rates pending Commission decision prior to the passage of the Mann-Elkins Act, and that that power still survives at least in part. The Government, on the other hand, is of the view that prior to 1910 the courts may well not have had any such power with respect to carrier rates. (Gov't Br. p. 27). It urges that on this assumption the Mann-Elkins Act, in addition to authorizing the Commission to suspend carrier rates, should be read to make possible for the first time the intervention of courts of equity further to suspend them. In sum, although paying lip service to the proposition that the arrangement provided by the Mann-Elkins Act is one of "compromise" and "balance" (Gov't Br. pp. 11, 12), the Government in fact would go so far as to read the statute as an additional grant of authority to both Commission and court.

calls the extraordinary case the courts may not supplement the Commission's suspension power.

Assuming as do petitioners the existence of the general power postulated prior to the enactment of Section 15(7), therefore, the question would be not whether Congress has abridged that power, but how much it has done so. And assuming, as does the Government at least tentatively, the absence of such power prior to the passage of that statute, the question would be whether Congress in the Mann-Elkins Act made an affirmative grant of such a power, on a limited basis or otherwise. We submit that the terms of Section 15(7), whose plain meaning is altogether consistent with their history, demonstrate that if such a power ever existed with respect to carrier rates it has been altogether abrogated, and *a fortiori* that if such a power did *not* previously exist there was no thought of bringing it into being.

Beyond this, however, the assumption as to the existence of such a general equitable power in the area of Interstate Commerce Commission regulation is, entirely apart from the terms of Section 15(7), subject to the gravest doubt.[30] In *Board of R.R. Comm'rs* v.

[30] Apart from two inapposite cases involving the Interstate Commerce Commission (see p. 63, *infra*), the decisions to which petitioners point for the proposition that there is inherent equity power to preserve the status quo pending administrative action all involve agencies exercising a regulatory authority far less pervasive than that of the Interstate Commerce Commission over rates. And it is noteworthy that in the case that both petitioners and the Government point to as the leading authority, West Indies Fruit & Steamship Co. v. Seatrain Lines, 170 F. 2d 775 (2d Cir. 1948), *cert. dismissed*, 336 U.S. 908, the court gave great weight to the fact that the injunction had been sought by the affected agency itself, in contrast to the present case where the ICC denies the authority of the courts to grant the relief asked by petitioners. Moreover, neither in that case nor in any of the others cited did the agency itself have a statutory power of suspension.

Great Northern Ry., supra, this Court not only stated its approval of the line of cases antedating the passage of what is now Section 15(7) that had held that there was no such judicial power as to carrier rate changes, but also went on squarely to hold that there was no power in the courts to issue an injunction "in aid of proceedings before the Interstate Commerce Commission" under another section of the statute. In that case a district court, upon allegation by certain railroads of irreparable injury, had enjoined a state order reducing intrastate rates until a determination could be made by the Commission under Section 13 of the Act as to whether the reduced intrastate rates would unjustly discriminate against interstate commerce. This Court reversed. To the contention that the injunction was in aid of the ICC proceeding—the Commission having no suspension power under Section 13—the Court responded that although by Section 13 Congress had made unlawful unjust discrimination through the fixing of intrastate rates it had entrusted "the appropriate enforcement of its prohibition primarily to the administrative agency." And, replying to the further contention "that the restraining power of the Court is needed to prevent irreparable injury," the Court said:

> "But, in this class of cases, the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission." 281 U.S. at 430.

This is a clear recognition by this Court that the pervasive regulatory scheme embodied in the Interstate Commerce Act is intended to be complete in and of itself and does not admit of judicial intervention until its processes have been completed.

Finally, the views of the statute pressed by petitioners and the Government would make possible the very

"confusion and discrimination" it was designed to supplant and remedy. Just as was true in 1910, there would certainly be many cases where the courts today would be unable satisfactorily to cope with the problems of obtaining jurisdiction over all parties to a tariff, of venue, of striking, with no intimate knowledge of the transportation industry, an equitable balance among the parties affected who resort to the courts and those who do not, of conflicting decisions where the same matter is litigated in different courts, and of fixing bonds adequate to protect the rate-making carrier in the event its rate is ultimately found to be lawful.

Particularly in a situation like the present one, involving a rate reduction, the "public interest" and "irreparable injury" are elusive concepts. Some are likely to be hurt if the rates of respondent are permitted to go into effect as provided by the statute, while others will undoubtedly be benefited. Under these circumstances it seems appropriate to leave the allocation of the burden and benefit where Congress so plainly placed it, to penalize for no longer a period those whom the rates will benefit, and who have already been denied that benefit for a substantial period, and to remit those who complain against the rates to the remedy that Congress has seen fit to give rather than permitting them to seek one that Congress has chosen to deny.[31]

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[31] It may be noted that the Government, although expressing the greatest concern over the situation where one potentially affected by the proposed rates of a carrier may suffer "extreme hardship" thereby, is apparently reconciled to the fact that a carrier who is exposed to a comparable degree of hardship by a Commission suspension of its proposed rates apparently has *no* remedy—adequate or inadequate—in the courts or elsewhere. See Consolidated Truck Service, Inc. v. United States, 193 F. Supp. 773 (D. N.J. 1960).

Such remission of complainants against the practices of railroads to the processes of the agency charged with regulating the carriers and denial to the complainants of anticipatory judicial relief is by no means unusual. It is a reflection of a public interest in having the uniformity and expertness of judgment that only the Commission can provide—a public interest that Congress elsewhere also has deemed significant enough to override private interests. Thus, Section 16 of the Clayton Act, 15 U.S.C. § 28, providing generally for injunctive relief for private parties claiming injury from violations of the antitrust laws, specifically excludes injunctions against a rail common carrier "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."[32] Construing this statute, this Court has said:

> "Its obvious purpose is to preclude any interference by injunction with any business or trans-

[32] As noted above, in their complaint petitioners alleged that, in violation of § 2 of the Sherman Act, the defendants were attempting to monopolize and had conspired with one another in attempting to monopolize the grain transportation here involved by reducing their rates below cost so as to destroy barge line competition. (R. 9). In this Court petitioners have wholly abandoned that purported antitrust ground of jurisdiction and claim. They were compelled to do so not only because of the specific terms of § 16 of the Clayton Act but also because of these other considerations:

1. Any attempt to create a monopoly of the sort and by the means originally alleged by the petitioners would be self-defeating. See p. 58, *infra*.

2. There was demonstrably no conspiracy among the defendants. The defendants other than Southern, nominal respondents in this Court, merely filed defensive tariffs to meet Southern's rates and have no interest in sustaining them, as shown by their failure to participate actively in this case or in the proceeding before the Commission. See p. 4, *supra*.

> actions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself . . . ." *Central Transfer Co.* v. *Terminal R.R. Ass'n*, 288 U.S. 469, 475.

Comparable considerations are present here.

II.

PETITIONERS' RELIANCE UPON "RELATED STATUTORY PROVISIONS" AS QUALIFYING THE UNEQUIVOCAL COMMAND OF SECTION 15(7) IS MISPLACED.

In an effort to give some semblance of color to their claim that Section 15(7) should not be read in accordance with its plain terms petitioners rely upon inferences purportedly to be drawn from "related statutory provisions." (Pet. Br. p. 23) None of the three statutory provisions to which they advert, however, relates at all to the proposition they advance or in any way supports a resolution in their favor of the single narrow question presented in this case.

A. THE NATIONAL TRANSPORTATION POLICY IS ALTOGETHER IRRELEVANT TO THE PROPER CONSTRUCTION OF THE PERTINENT TERMS OF SECTION 15(7).

Petitioners first point to the terms of the National Transportation Policy, 49 U.S.C., note preceding § 1, that in substance direct the Interstate Commerce Commission fairly and impartially to regulate all modes of transportation subject to the provisions of the Interstate Commerce Act. They urge that the legislative history of the National Transportation Policy discloses an apprehension on the part of some members of Congress that water carriers, which were placed under the jurisdiction of the Interstate Commerce Commission in the Transportation Act of 1940 of which the Policy

was a part, would be so regulated by the Commission as to be prevented from competing effectively with the railroads, and suggest that the part of the Policy they invoke was specifically designed to set this apprension at rest.[33]

Even if this be conceded *arguendo* to be an accurate reading of the National Transportation Policy in light of its legislative history, its relationship to the present case is difficult to discern. Section 15(7) of the Interstate Commerce Act, the statutory provision at issue in this case, was, as we have pointed out above, first enacted in 1910 and last amended in any respect pertinent to the present problem in 1927.[34] It can hardly be seriously argued that a general statement of Congressional policy promulgated thirty years after the adoption of that statutory provision, and some thirteen years after its most recent amendment, sheds any significant light on the intent of the Congress in adopting and amending it. And even petitioners do not go so far as to urge that, if the issue in the present case would have properly been decided in favor of respondent prior to the promulgation of the National Transportation Policy, it should nevertheless be decided differently

[33] It may be noted that there cannot possibly be any complaint that this case involves a situation wherein the Commission is "so regulating water carriers as to prevent them from competing effectively" since the carriage by water of the bulk commodities covered by respondent's rates is for the most part specifically exempted from Commission regulation. See 49 U.S.C. § 903(b).

[34] The terms of § 15(7) were considered by Congress at the time it adopted the Transportation Act of 1940. The section was amended to place upon carriers the burden of proving the lawfulness of all proposed rate changes rather than merely rate increases, as to which they had borne the burden of proof since 1910. No other change was made in the section.

today because the Policy should in effect be read as amending Section 15(7). Since, therefore, the Policy cannot be read either as a reliable guide to the understanding of a specific Congressional determination made many years before or as a reversal of that determination, no argument based upon it has any proper place in this litigation.[35]

There is another reason why the terms of the National Transportation Policy are irrelevant in the present case. That policy, as petitioners themselves point out, is a directive to the Interstate Commerce Commission as to the basis upon which it shall exercise the jurisdiction and powers conferred upon it in the Interstate Commerce Act. Thus, while it may be said to impose on the Commission a "positive and active duty to administer each provision of the Act in such a way as to preserve the inherent advantages of each mode of transportation," *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411, 416 (N.D. Ala. 1959), *aff'd*

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[35] The Board of Investigation and Research was established by the Transportation Act of 1940, which also contains the National Transportation Policy. It is noteworthy that in its Report on Practices and Procedures of Governmental Control in 1944, four years after the adoption of the Policy, the Board made the following specific and unequivocal statement with respect to § 15(7) (H.R. Doc. No. 628, 78th Cong., 2d Sess. 185):

> "If the [investigation and suspension] proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, etc., becomes effective at the close of that period unless voluntarily further postponed by the carrier."

In light of the fact that the report refers to one circumstance under which a proposed rate does not become effective at the close of the suspension period, the omission of any suggestion that the proposed rate's effectiveness might also be delayed by order of court cannot be regarded as inadvertent.

per curiam, 361 U.S. 353, and to impose on courts reviewing Commission action the duty to judge such action by the same general standard, it cannot play a part in a case like this where there is no issue as to what the Commission should or should not do, but where, rather, it is common ground that the Commission has no duty or authority to act.[36]

B. THE RELIEF SOUGHT BY PETITIONERS IS NOT WITHIN THE SAVING CLAUSE OF SECTION 22 OF THE ACT.

Petitioners next argue that the saving clause of Section 22 of the Interstate Commerce Act, 49 U.S.C. § 22, which preserves common law remedies not inconsistent with the statutory scheme, is "of relevance" in the construction of Section 15(7).[37] (Pet. Br. p. 25) This argument, an afterthought here advanced by petitioners for the first time, is without merit for several reasons.

[36] In the assessment of general governmental policy toward the apparent position of the petitioners that they are entitled to rail rates high enough to insure that water carriers will be able to participate in particular traffic, consideration may appropriately be given to the amendment, in 1958, of § 15a(3) of the statute to provide that

> "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this chapter and chapters 8, 12, 13 and 19 of this title." 49 U.S.C. § 15a(3).

See also the recent Presidential Transportation Message, H.R. Doc. No. 384, 87th Cong., 2d Sess. 4, where comment is made as to the inequity and undesirability of subjecting railroads to minimum rate regulation in the transportation of bulk commodities while at the same time exempting water carriers from such regulation.

[37] See too the Government's offhand "note also . . ." reference to Section 22. (Gov't Br. p. 22)

First, the argument completely begs the question presented by this case—whether Section 15(7) means what it says in providing that after the suspension period has expired rates filed by a carrier "shall go into effect." If it does, then even if a common law remedy could be said otherwise to have existed, any such remedy must be deemed to have been abrogated since it would by hypothesis be inconsistent with the statutory scheme. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426.[38] Petitioners, in asserting that the words of 15(7) must be disregarded if to give them effect would curtail a common law remedy that existed prior to passage of the Act, thus approach the problem from the wrong end. There is no reason for disregarding the specific provisions of the statute in order to accommodate a common law remedy. Rather, it is necessary first to look to the specific statutory provisions, for only thereafter can it be determined what common law remedies can survive under the general saving clause consistent with those provisions. See *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29. In this instance it is plain that the judicial remedy sought by petitioners, even had it existed at common law, would be flatly inconsistent with

[38] See also Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., — U.S. —, construing the parallel provision in Part II of the statute (49 U.S.C. § 316(j)): "Survival [of a common law remedy] depends on the effect of the remedy upon the statutory scheme of regulation. According to § 216(j), if the remedy is inconsistent with that scheme it does not survive."

The Government refers to the *Hewitt-Robins* case in support of the proposition that it is always proper to construct a judicial remedy so long as that remedy is not contrary to the statutory scheme. (Gov't Br. p. 21). That case dealt, however, only with the survival of common law remedies, and as we shall show (pp. 57-62, *infra*), the remedy that petitioners here seek to invoke is not such a remedy.

the express and unequivocal statutory command—that at the end of the suspension period, whether or not the Commission's investigation has been completed, the rates "shall go into effect."

Further, in view of the conceded consequences of provisions of Section 15(7) other than that here in question, there is no reason to start with any presumption that Congress in that section did not intend to establish a system of rights and duties complete and exclusive in and of itself, and departing significantly from the situation that would otherwise have existed under the common law. Thus, whereas prior to the passage of the Interstate Commerce Act the carrier was free to initiate its own rates, Section 15(7) drastically qualifies that preexisting right by lodging in the Commission a wholly discretionary power, whose exercise altogether deprives the carrier for up to seven months of its right to make its own rates, and without any possibility of redress should the rates suspended ultimately be found lawful. And whereas at common law the burden was on one protesting against a changed carrier rate to show it invalid, Section 15(7) requires the carrier, in the event of investigation of the rate, affirmatively to justify it. There is thus clearly no occasion for reading this section, which first came into being long after the adoption of the general language of Section 22 and which concededly drastically alters common law relationships in other vital respects to the detriment of the rate-making carrier, in contradiction of its plain terms in order to accommodate any fancied policy of preserving unaltered in this respect common law relationships.

In what we have just said we have assumed that to construe the statute as denying to petitioners the relief

they here seek would be to withhold from them a remedy they would have had absent the statute—that the remedy that petitioners here seek to invoke is in fact one that existed at common law. This is not the case.

1. It is clear that the real thrust of petitioners' complaint against respondent's rates is that those rates are unreasonably low, and that they will accordingly prejudice water carrier competition, with direct ill effects upon petitioner Arrow and consequential ill effects upon the other petitioners. At common law, however, "unreasonably" low rates were not unlawful and hence gave rise to no cause of action on the part of anyone—shippers or their competitors, competitors of the carrier or municipalities. *Keogh* v. *Chicago & N.W.R. Co.*, 260 U.S. 156; *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557.[39] Accordingly, no right of action based on this alleged illegality could be said to be preserved to petitioners by Section 22 of the statute.

Petitioners apparently recognize this difficulty, for they assert that respondent's rates are not merely un-

[39] Petitioners' claim that respondent's rates have been deliberately set at noncompensatory levels in order to eliminate barge competition and achieve a transportation monopoly is in any event on its face implausible in light of the fact that such a course would be altogether self-defeating, since no monopoly thus achieved would benefit respondent financially. Thus § 4(2) of the Act provides that:

> "Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." 49 U.S.C. § 4(2).

reasonably low but also "grossly discriminatory" and that the latter circumstance is in itself sufficient to support their suit.[40] There is, however, an insurmountable obstacle to this argument.

Petitioners have conceded, as they must, that had the rates of respondent that they seek to enjoin not been suspended by the Interstate Commerce Commission they would have had no basis for seeking relief in the courts—that under these circumstances respondent's rates would have had to be allowed to become effective without judicial interference.[41] Their argument that the considerations that would bar relief under those circumstances do not operate here rests squarely on the contention that here the Commission has made a preliminary finding of "presumptive" illegality and has suspended the rates for the full statutory period, and that an injunction will therefore assist rather than derogate from the Commission's primary jurisdiction.[42] Even were this argument otherwise sound, its fatal flaw lies in the fact that on no view can it be said that the Commission in exercising its suspension power has made a preliminary finding that respondent's rates are presumptively illegal in any respect

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[40] The asserted factual basis for this latter contention has been largely destroyed by events that took place during the course of the Commission hearing. See p. 8, *supra*.

[41] Thus in petitioners' Memorandum in Support of Motion for a Preliminary Injunction filed in the District Court petitioners expressly stated (p. 45): ". . . we agree that this court would have no jurisdiction to intervene if the I.C.C. had *refused* to suspend the rates." The Government is of the same view. (Gov't Br. p. 41).

[42] This argument must be assessed in light of the fact that the Commission's position as to judicial power in the premises is directly contrary to that asserted by petitioners and the Government in this case. (See Gov't Br. p. 1).

recognized as wrongful at common law. Section 15(7) requires the Commission to issue a statement of reasons as a condition precedent to the ordering of a suspension of rates, and such a statement was duly issued in this case. That statement will be searched in vain for any finding of, or indeed reference to, discrimination; the statement rather refers only to standards of legality that have no counterpart at common law.[43] Insofar as petitioners challenge respondent's rates as unlawful in any sense recognized by the common law, therefore—and Section 22 by its terms could not aid petitioners in a challenge based on any other standard of alleged illegality—there is no basis for any distinction between this case and one in which the Commission's suspension power has not been exercised.[44]

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[43] The Commission said, "there is reason to believe that [the tariffs] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy . . ." (R. 7).

[44] Discrimination is a concept that is quite distinct from unjustness and unreasonableness and is by no means necessarily involved in unfair or destructive competitive practices. Section 2 of the Act, 49 U.S.C. § 2, defines and prohibits "unjust discrimination," the charging or collecting from one person of a greater or less amount than from other persons for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar conditions." Another section of the Act, § 1(5), 49 U.S.C. § 1(5), lays upon railroads the duty of establishing rates that are "just and reasonable." In transportation law and public utility law generally these are words of art that mean rates that are neither uneconomically low nor exorbitantly high. "Unfair or destructive competitive practices," which are listed in the National Transportation Policy, note preceding 49 U.S.C. § 1, in a series that also separately includes "unjust discriminations," need involve no element of discrimination but rather comprehend such practices as establishing rates at less than the cost of providing the service to the detriment of competitors, as seems to be the thrust of petitioners' complaint against respondent's rates here.

2. Even were it to be assumed that prior to the passage of the Interstate Commerce Act persons in the position of petitioners could have invoked some form of equitable remedy with respect to rates such as those of respondent here, and that the terms and procedures of Section 15(7) did not in themselves supersede that remedy, it is apparent that the right of action which petitioners here assert is not one that existed at common law. In the first place, as pointed out above, petitioners recognize that an indispensable ingredient of their suit is the fact that the Commission has heretofore exercised its power of suspension with respect to the rates in question, and that had no suspension been ordered by the Commission they would have had no right to relief. By hypothesis no cause of action to which prior Commission suspension pursuant to statute is a condition precedent can be said to have been in existence at common law.

Furthermore, petitioners do not and cannot ask for a permanent injunction against respondent's rates, even if the Commission should find those rates to be unlawful. The grant of such relief is manifestly precluded by the statutory scheme whereby any order of the Commission with respect to the rates, whether approving or disapproving them, is subject to review only by a three-judge district court. Rather, the injunction petitioners seek would, unlike any injunction that could have issued at common law with respect to carrier rates, expire by its own terms at the time the Commission finally disposes of the rate proceeding before it and would at no time during its period of effectiveness rest on any determinative judicial, or indeed administrative, finding of illegality. Such a remedy plainly could have no existence apart from the Interstate Commerce Act

and accordingly could not be deemed to be "preserved" by reason of Section 22.

C. THE STATUTORY PROVISIONS FOR JUDICIAL REVIEW OF COMMISSION ORDERS ARE OF NO ASSISTANCE TO PETITIONERS.

The third of the "related statutes" upon which petitioners rely, 28 U.S.C. §§ 2324, 2325, likewise is of no help to them. Petitioners assume without discussion that those provisions, which deal with the authority of three-judge district courts to review Interstate Commerce Commission orders, authorize such courts to enjoin carrier-initiated rates after the Commission has completed an investigation and issued an order approving, or refusing to disapprove, them.

Contrary to petitioners' assumption, there is nothing in the statutes to which they refer that supports the view that three-judge courts have such authority. Rather these statutes are directed to the authority of a three-judge court to grant interlocutory or permanent injunctions restraining the operation of Interstate Commerce Commission *orders*. It is elementary that under the Interstate Commerce Act the effectiveness of a carrier-initiated rate schedule does not depend upon a Commission order approving it, and accordingly any injunction against such an order would have the effect not of invalidating or suspending the rates, but only of cancelling any Commission approval of them and remitting the parties to appropriate further proceedings before the Commission.[45]

Further even if the statutes in question did not on their face exclude an exercise by three-judge courts

[45] The situation discussed in the text is to be distinguished from cases like The Chicago Junction Case, 264 U.S. 258, where the validity of the acts enjoined by the three-judge court depended upon the affirmative approval of a Commission order.

of the kind of authority petitioners would ascribe to them, that fact would hardly provide a justification for ignoring the unequivocal terms of Section 15(7) in order to ascribe a like power to a single judge in the circumstances here presented. There is no principle of law which justifies the disregard of a plain statutory provision in order to prevent an alleged lack of symmetry between it and another statute, see *United States* v. *Shirey*, 359 U.S. 255, 262, particularly when that lack of symmetry would arise only if the second statute were to be given a reading which under no circumstances could be urged to be demanded by its terms but at the very most could be said only not to be foreclosed by them.[46]

Finally, even if it were clear that Congress had vested in three-judge district courts the power to enjoin carrier rates pending review of Commission orders, that fact would by no means suggest that a single judge ought to be permitted to exercise the authority at issue in this case. For the very fact that such power was entrusted to a three-judge court rather than to the regular district courts would be a clear manifestation of the Congressional intention that matters of this kind,

[46] In Pacific Inland Tariff Bureau v. United States, 129 F.Supp. 472 (D. Ore. 1955), and Cantlay & Tanzola, Inc. v. United States, 115 F.Supp. 72 (S.D. Cal. 1953), it appears that carrier rates were enjoined as incident to suits to enjoin Commission orders approving them or allowing them to go into effect. In neither case does it appear that the argument of a complete lack of power of the court to enjoin the rates pending review of the order was made at the time the original injunction issued. In *Pacific Inland* the argument seems never to have been made. When the basic question of power was raised in *Cantlay & Tanzola*, at the time of the decision on the merits annulling the Commission's order, the court found it unnecessary to decide since the carriers had voluntarily reinstated the previous rates. 115 F.Supp. at 83-85.

which do not relate merely to the propriety of past carrier acts but which control future transportation practices, are not to be dealt with by a single judge. See *United States* v. *Griffin*, 303 U.S. 226, 233.

III.

PETITIONERS' ASSERTION THAT DENIAL OF THE RELIEF THEY SEEK WOULD RAISE CONSTITUTIONAL PROBLEMS IS WHOLLY WITHOUT MERIT.

Only a word need be said as to petitioners' contention that to read Section 15(7) as it is written would raise "grave constitutional difficulties." Cases like *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290, upon which petitioners rely, are wholly inapposite here because the possibility of injury against which petitioners demand protection is one arising not from governmental regulation of their own rates or businesses but rather from the competition of respondent and the shippers respondent serves. The Constitution gives no guarantee of protection from competition. *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118. Compare *United States* v. *Illinois Central R. Co.*, 291 U.S. 457, 465 (concurring opinion): "At most it appears that the interest sought to be protected is a prospective share of future traffic which it is feared may be diverted to the Barge Line, an interest to which the Constitution plainly affords no protection."

Petitioners' argument is particularly unconvincing in light of the fact that should respondent's rates ultimately be held unlawful they would have available the provisions of Section 8 of the Interstate Commerce Act, 49 U.S.C. § 8, to which the Court of Appeals referred as giving an action for damages to persons

injured by unlawful rate practices. Their situation thus stands in sharp contrast to that of respondent, and to the situation of the public which respondent serves. As a result of the suspension of respondent's new rates for the seven-month statutory period, respondent and the public have already been forever deprived of the benefits that would have flowed from those rates during that period, even should the rates be hereafter found, in the proceeding now pending for decision before the Commission, to be in full compliance with law.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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